IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

Mangi Lal & anr. vs. Onkar Lal

S.B.Civil Second Appeal No.120/1982 under Section 100,C.P.C. against the judgment and decree dated 13.8.1982 passed by the Addl. District Judge, Udaipur in Civil Ist Appeal No.11/1979.

Date of judgment: January 09, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr. M.R.Mehta for the appellants.

Mr. G.Vaishnav) for the respondent
Mr. R. Chouhan)

BY THE COURT:

This appeal by the defendants against the judgment of the trial court dated 29.8.1979 and dismissal of the appeal by the appellate court by the judgment and decree dated 13.8.1982.

Brief facts of the case are that respondent-plaintiff filed the suit for mandatory and prohibitory injunction against the appellants-defendants alleging that the suit property was partitioned between the plaintiff and defendant no.1 by registered partition deed dated 30.11.60. Since both the parties are in occupation of the property as it

fell in the share of the parties and are enjoying the benefit of common portion left for the beneficial use of the properties for both the parties. The plaintiff claimed that the defendants-appellants constructed septic-tank for their latrine on the land shown in red colour in map Ex.1, which according to the plaintiff came in the share of the plaintiff-respondent. It is also stated that after leaving the passage of 2'6" in front of latrine, the defendants have constructed pukka bath room of 4'x8" in length and 4'x10" in the width on the northern side of the latrine. The defendants also covered bath-room and passage by placing roof on it and placed shed on the exit of bath room and that shed has gone one feet inside below the tin-shed of plaintiff over Verandah. It is also stated that the defendants dig pits on the land belonging to the plaintiff. The plaintiff raised grievance ac according to the plaintiff, the plaintiff's air and light has been obstructed by the act of the defendants. However, it is was not disputed, rather admitted case of the plaintiff that as per the partition-deed dated 30.11.1960 itself, the defendants were entitled to construct bath-room in accordance the terms of the partition-deed on the land on the southern side of the latrine which was already in existence. The plaintiff claimed that the constructions raised by the defendants were wholly illegal and violated the plaintiff's right to enjoy the property, therefore, the defendants be directed to remove the structures which they have raised effecting the plaintiff's rights and

which were in violation to the terms contained in the partition-deed dated 30.11.1960.

The defendants-appellants contested the suit and submitted written statement. The defendants admitted the fact of partition and the execution of the partition deed dated 30.11.1960. The defendants denied that they ever dig pits to obstruct the plaintiff from enjoying the property. The defendants claimed that they constructed bath-room but it is on their own land and the septic-tank underneath the bath-room is also constructed by them as they have right to construct the septic-tank also under the bath-room. It is also submitted that all the constructions which were raised, were in the knowledge of the plaintiff and the plaintiff also gave his consent, obviously implied, for the construction as it was in accordance with the terms and condition of the partition-deed dated 30.11.1960. The defendants also stated that he denied the placing of shed on the existing bath-room and it is submitted that only Rosh (balcony) has been constructed by them. The defendants submitted that the bath-room has been constructed on 27.75 sq.ft. leaving passage of 11 sq.ft. Thus the area of bath-room is much less than the area of the latrine and in the partition-deed dated 30.11.1960, it is clearly mentioned that the defendants shall have right to construct latrine/bath-room equal to the measurement of the existing latrine. The

defendants also placed on record map Ex.1, which according to the defendants was prepared along with the partition-deed dated 30.11.1960 and which bears the signatures of the plaintiff and defendant no.1. Any obstruction and air and light was empathically denied by the defendants and the defendants prayed that the suit of plaintiff be dismissed.

The trial court framed the issues and both the parties led their evidence and also produced documents. It was submitted by the defendants that the latrine which was in existence, there were steps of the stairs and they are part and parcel of the latrine and if that is included in the measurement of latrine, then the defendants' area of construction is less than the area of the latrine of the plaintiff. But this argument of the defendants did not convince the trial court as well as to the appellate court. Both the courts below also did not accept the plea of the defendants that the defendants constructed the bath-room in front of the latrine which they could have constructed in terms of the partition-deed and the grievance of the plaintiff that the defendant could have construct the latrine and bath-room in the rear portion, was not found well founded, rather was held to be contrary to the terms of the partition deed. The trial court also found that the coverage of the passage by the defendants was wrong. Ultimately, the trial court

decreed the suit of the plaintiff and the trial court directed the defendants to demolish the portion of the bath-room which is in excess of 4'10" in length(north to south), 3'6" in width (East to West), shown as 'Z' in the map Ex.1. The defendants were further directed to remove the septic-tank below the excess area of the bath-room and the trial court directed the defendants to remove the stones covering of the passage. It was further ordered that the defendants may keep the sheds covering half of common land only on the western side of the bath-room marked 'Z' and remove the portion of the shed which went under the tin-shed of the plaintiff.

Being aggrieved against the judgment and decree dated 29.8.1979, the defendants preferred first appeal which was dismissed by the appellate court by judgment and decree dated 13.8.1982. Hence this second appeal.

Following substantial questions of law were framed by this Court on 10.1.1983 while admitting the appeal:-

> *"(i) Whether the courts below committed an error in directing the demolition of the bathroom and the septic-tank constructed by the appellants, in excess of the area measuring 4'10" x 3'6" ?*

(ii) Whether the order passed by the two courts below regarding the demolition of the bathroom and septic tank is in contravention of the terms of the partition deed Ex. 4 ?

(iii) Whether the appellants are entitled to cover the passage lying between their latrine and the bathroom according to the terms of the aforesaid deed Ex. 4?

(iv) Whether the relief in respect of demolition of Rosh or Chajja could not have been granted in the absence of a specific claim in the plaint ?

Heard learned counsel for the parties and perused the record also.

The learned counsel for the appellants vehemently submitted that the two courts below mis-read and mis-construed the partition-deed dated 30.11.1960. In the partition deed, it is clearly mentioned that the defendants shall have right to raise construction of the latrine of area equal to the existing latrine of the plaintiff. The plaintiff also admitted that the defendants have right to construct the latrine. There is dispute about measurement and the defendants under bona fide belief raised the constructions of the bath-room by taking that the area of the stairs will form the part of the area of the existing latrine of the plaintiff. Therefore, the defendants constructed the said bath-room and under it a septic-tank was also constructed. The act of the defendants is not

with intention to cause any harm to the plaintiff. It is also submitted that even if it is found that the area of the stairs cannot be included in the area of the latrine even then it was not a case for grant of mandatory injunction and compensation could have been awarded. It is also submitted that the septic-tank is underneath and even if it is in excess of permissible area even then it will remain underground and it will not affect any party in any manner because by keeping the septic-tank as it is below the ground, both the parties will be free to use the land above the septic-tank. The septic tank is under the area of both room and may be in the area of the passage, therefore, the courts below could not have granted the decree for demolition of any portion of the bath-room or for removing the septic-tank. It is also submitted that decree for removal of Rosh (Chhaja) could not have been granted because the plaintiff did not specifically pray relief for these structures and for their removal.

The learned counsel for the respondent vehemently submitted that now the defendants are not residing in the house in dispute and the two courts below concurrently found that the defendants have raised constructions over the land which does not belong to them. The two courts below also held that the area of the stairs cannot be included in th measurement of the latrine and that is also a finding of fact. The

learned counsel for the respondent tried to support the judgments of the two courts below with the help of the pleadings as well as by pointing out the partition deed and the map. It is also submitted that the two courts below considered the documentary as well as oral evidence. Therefore, there is little scope for interference by this Court while exercising jurisdiction under Section 100,C.P.C.

I considered the submissions of the learned counsel for the parties.

It is clear from the admitted fact that the suit property was partitioned between the plaintiff and defendant no.1 and for that purpose a deed of partition was executed on 30.10.1960. Ex.1 is certified copy of the partition deed. This document is admitted document of both the parties. At page 11 of the partition deed, it is clearly mentioned that two maps were also prepared along with partition-deed and the maps were signed by both the parties. The defendants produced map Ex.A.1 which bears the signatures of the plaintiff and the defendants. At page 2 of the partition-deed it is clearly mention that in the western side of *pole*, there is a constructed latrine which is in the share of party no.1, i.e. the plaintiff and it is provided that the party no.2, the defendant no.1 shall have right to raise the

latrine of the equal size in front of the latrine of the plaintiff. Therefore, the defendants' right to raise construction of the latrine cannot be denied and has rightly not been denied by the plaintiff. The question is only to the effect whether the area of defendants' raising construction of bath-room and latrine is in excess of the area of the latrine of the plaintiff. The two courts below though considered the partition deed, map and oral evidence but failed to notice that the plaintiff in his plaint nowhere pleaded what was the exact measurement of his latrine. The plaintiff only pleaded that the defendants constructed a bath-room and put tin-shed on the land of the plaintiff and also constructed a septic-tank. The measurement of the bath-room, as given by the plaintiff in the plait, is 4'8" in length and 4'10" in width. It is also alleged that the portion of the bath-room measuring 2'4" went under the tin-shed of the plaintiff. The two courts below rejected the defendants' plea for inclusion of the measurement of the stairs on the ground that there is no mention of the stairs in the partition deed but at this time, failed to appreciate that the plaintiff did not plead in his plait that the said stairs were raised after the partition between the plaintiff and defendants no.1 and not formed part of the latrine itself. There is every possibility that stairs were not treated as very important fact to be mentioned in the partition-deed separately, but looking to the construction, the area of the stairs cannot be separated from the area

of the latrine. It is not in dispute that the latrine of the plaintiff is at height and that can only be used with the help of the stairs. Mere not mentioning of the stairs in the partition-deed is not of much insignificance and is of no consequence looking to the facts of this case and plea of defendant is not contradicting the facts mentioned in the partition-deed. Therefore, the two courts below mis-read and mis-interpreted Ex.4 partition-deed as well as the map Ex.A.1. In view of the above, the construction raised by the defendants, of the latrine and the bath-room cannot be said to be in excess of the latrine of the plaintiff. It appears that the relevant measurements have not been given in the plaint but there is doubt about the exactness in the measurement. The plaintiff should have pleaded specifically the exact measurement of his latrine and should have pleaded the exact area over which the construction was raised by the defendants but the plaintiff in his plaint and specifically in para 3 of the plaint, very vaguely stated that the defendants have constructed septic-tank and after leaving 2'6" passage in front of the latrine, a bath-room measuring 4'8" x 4'10" has been constructed. The plaintiff did not give measurement of his own latrine, equal of which the defendants had right to construct the latrine/bath-room. The plaintiff also pleaded only that the defendants started construction on 25.2.1974 and constructed bath-room and septic-tank on 9.3.1974 and, thereafter, dig pits on 13.3.1974. The plaintiff did not

explain why he did not file the suit immediately on 25.2.1974 or thereafter on 9.3.1974. That has also shows that the plaintiff was not very much vigilant about his rights if they were violated by the defendants. This fact was also not considered by the courts below, even when the defendants specifically took a plea that all the constructions were raised in the presence and knowledge of the plaintiff. The plaintiff even did not plead that by this act of the defendants, he is going to suffer loss of the extent which cannot be compensated by money and the two courts below did not consider whether it is a fit case for grant of mandatory injunction in the facts of the case or the compensation could have been awarded. In view of the above discussion, the substantial questions no.1,2 and 3 are decided in favour of the appellants and the decree of the mandatory injunction so far as bath-room and septic-tank are concerned, is set aside.

So far as decree for demolition or removal of *Rosh* or balcony to the extent beyond half of the joint property is concerned and about the shed under the tin-shed of the plaintiff are concerned, the finding of fact has been recorded by the two courts below against the defendants which cannot be interfered in this appeal, but no useful purpose would be served by asking the defendants to remove the half of the shed, as the courts below recognized the rights of the defendants to keep half of

the shed and the compensation only could be the adequate relief in the facts of the case. Therefore, substantial question no.4 is partly decided against the appellants and in favour of the plaintiff, though the relief is modified.

In view of the above discussion, the respondent-plaintiff is entitled to damages of Rs.5000/- from the appellants in place of decree for removal of any structure from the property in dispute. However, it is made clear that if the septic-tank is obstructing the way, the same shall be kept in the level of the passage so that there shall not be any obstructions in the free passage.

In view of the above, the appeal of the appellants is partly allowed. The judgment and the decree of the trial court dated 29.8.1979 and the judgment and the decree of the appellate court dated 13.8.1982 are set aside so far as demolition and removal of any of the structures raised by the appellants are concerned. However, the decree for damages of Rs.5000/- is granted in favour of the plaintiff. No order as to costs.

(PRAKASH TATIA),J.

mlt.